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No. 10-1020

In the Supreme Court of the United States

CONSOLIDATION COAL COMPANY, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, requires coal operators to pay an Abandoned Mine Land fee based upon the weight of coal produced. By regulation, assessment and collection of the fee are delayed until the time of first sale, transfer, or use of the coal. The question presented is as follows:

Whether the Abandoned Mine Land fee, as applied to coal that is eventually exported, is permissible under Article I, § 9, Clause 5 of the United States Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 615 F.3d 1378. The opinion of the Court of Federal Claims (Pet. App. 10a-24a) is reported at 86 Fed. Cl. 384. Prior opinions of the court of appeals (Pet. App. 25a-31a) are reported at 351 F.3d 1374 and 528 F.3d 1344. Prior opinions of the Court of Federal Claims (Pet. App. 32a-69a) are reported at 54 Fed. Cl. 14, 64 Fed. Cl. 718, and 75 Fed. Cl. 537.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2010. A petition for rehearing was denied on October 12, 2010 (Pet. App. 70a-72a). On December 21, 2010, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including

February 9, 2011, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. 1201 *et seq.*, in order to, *inter alia*, "promote the reclamation of mined areas * * * which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of land or water resources, or endanger the health or safety of the public." 30 U.S.C. 1202(h). In order to pay for certain reclamation and restoration processes, SMCRA establishes an "Abandoned Mine Reclamation Fund," a trust fund administered by the Secretary of the Interior. 30 U.S.C. 1231. One source of deposits into the fund is an Abandoned Mine Land fee (AML fee) that is imposed on "[a]ll operators of coal mining operations subject to" SMCRA, and that is calculated based on the amount of "coal produced" by such operators. 30 U.S.C. 1232(a). The primary objectives of the Abandoned Mine Reclamation Fund are "the protection[] of public health, safety, and property from extreme danger of adverse effects of coal mining practices," and "the restoration of land and water resources and the environment * * * that have been degraded by the adverse effects of coal mining practices." 30 U.S.C. 1233(a).

With minor exceptions, the AML reclamation fee is imposed upon all "coal produced" by covered operators. 30 U.S.C. 1232(a). The statute provides:

> All operators of coal mining operations subject to the provisions of this chapter shall pay to the Secretary of the Interior, for deposit in the fund, a reclamation

> fee of 31.5 cents per ton of coal produced by surface coal mining and 13.5 cents per ton of coal produced by underground mining or 10 per centum of the value of the coal at the mine, as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine, or 9 cents per ton, whichever is less.

Ibid.[1]

SMCRA authorizes the Secretary of the Interior to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions" of the law, 30 U.S.C. 1211(c)(2), 1242(a) (2006 & Supp. III 2009), and the Secretary has exercised that authority, see 30 C.F.R. Subchap. R. In fashioning the regulatory scheme, the Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSM) considered two different methods of determining how much coal has been "produced." 42 Fed. Reg. 44,956 (1977). The first approach would have required each coal mine operator to weigh its coal as soon as it was extracted from the earth, before any non-coal materials, such as dirt, rocks, and tree stumps, had been removed. *Ibid.* Under the second approach, the fee calculation would be based on the weight of the coal at the time of its first bona fide sale, transfer of ownership, or use by the mine operator. *Ibid.* The initial sale, transfer, or use represents the first common point where weights are usually determined within the industry. *Ibid.* To accommodate that industry practice, and to

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[1] Before October 1, 2007, the statute imposed a per-ton fee of 35 cents and 15 cents for coal produced by surface mining and underground mining, respectively.

allow the operator to remove non-coal materials before the required weighing occurs, OSM adopted the second approach. 42 Fed. Reg. at 62,713-62,716 (final rule); 30 C.F.R. 870.12.

Thus, under SMCRA, a mine operator's legal obligation to pay the reclamation fee arises at the time that coal is "produced," 30 U.S.C. 1232(a), and under the regulations, the amount of the fee owed is calculated at the time of the coal's first sale, transfer, or use, 30 C.F.R. 870.12(b). Operators are permitted to remove impurities before calculating the fee if they keep records demonstrating that they have removed only impurities (rather than coal subject to the fee). 30 C.F.R. 870.12(b)(3)(ii) and (iii). Any "[i]mpurities that have not been removed prior to the time of initial bona fide sale, transfer of ownership, or use by the operator," may not be deducted from the gross weight measurement on the basis of which the fee is calculated, except that operators may take a deduction to account for excess moisture that accumulates on the coal after extraction. 30 C.F.R. 870.12(b)(3)(i).

2. In 2001, petitioners—a group of more than 60 coal producers—filed complaints in the United States Court of Federal Claims (CFC), seeking damages in the amount of the AML fees paid upon coal they had allegedly produced and exported from the United States. *Consolidation Coal Co.* v. *United States*, 351 F.3d 1374, 1377 (Fed. Cir. 2003) (*Consolidation Coal II*); see Pet. ii-iii (listing petitioners). Petitioners argued that the AML fee as calculated under the OSM regulations, when imposed on coal that is ultimately exported, violates the Export Clause of the Constitution, U.S. Const. Art. I, § 9, Cl. 5. See Pet. App. 41a-69a. The CFC initially granted summary judgment in favor of the United

States on a jurisdictional ground. *Consolidation Coal Co.* v. *United States*, 54 Fed. Cl. 14 (2002) (*Consolidation Coal I*). That decision was reversed on appeal. *Consolidation Coal Co. II*, *supra*. On remand, the CFC granted summary judgment in petitioners' favor, concluding that, as applied to coal that is exported, the method by which OSM collects the AML fee violates the Export Clause. Pet. App. 32a-69a.

3. The court of appeals reversed and remanded. Pet. App. 25a-31a. The court considered whether the statutory term "coal produced," as used in 30 U.S.C. 1232(a), "refers solely to coal extracted" or "include[s] the entire process of extracting and selling coal." Pet. App. 28a. The court concluded that the first construction would be consistent with the Export Clause but that the second would not. *Id.* at 28a-30a. Applying the canon of constitutional avoidance, the court construed the statutory term "coal produced" to mean "coal extracted." *Id.* at 29a. Accordingly, the court reversed the CFC's grant of summary judgment and remanded the case for further proceedings. *Id.* at 31a.

4. On remand, petitioners renewed their motion for summary judgment, contending that OSM's regulations themselves violate the Export Clause because they "impose[] the reclamation fee on coal extracted *and sold*." Pet. App. 18a. The CFC viewed the Federal Circuit's most recent opinion in the case as effectively holding that OSM's implementing regulations do not violate the Export Clause. *Id.* at 22a. The court therefore granted the government's motion for summary judgment and dismissed the suit. *Id.* at 24a.

5. The court of appeals affirmed. Pet. App. 1a-9a. The court reiterated its prior conclusion that SMCRA imposes the reclamation fee on coal extracted rather

than on coal sold, and it construed the OSM regulations implementing that scheme to be consistent with the statute. *Id.* at 7a-9a. Relying on this Court's decision in *Liggett & Myers Tobacco Co.* v. *United States*, 299 U.S. 383 (1937), the court explained that a fee imposed upon manufacturing is not transformed into a sales tax simply because its collection is deferred until the product is sold or otherwise removed from a factory. Pet. App. 6a-8a. The court concluded that the deferred-payment scheme embodied in OSM's regulations does not affect the constitutionality of the fee, which the court had already determined was imposed upon the production of coal. *Id.* at 6a-9a. Rather, the court of appeals explained, the timing of the fee "simply 'mitigates the burden' on operators by not requiring installation and use of weighing equipment at the time of extraction." *Id.* at 7a (quoting *Liggett*, 299 U.S. at 386).

ARGUMENT

Petitioners argue that, as applied to exported coal, the reclamation fee at issue in this case violates the Export Clause of the Constitution, U.S. Const. Art. I, § 9, Cl. 5. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the fee imposed by SMCRA and implemented through OSM regulations does not run afoul of the Export Clause. That Clause provides: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5. This Court has long held that, although the Export Clause prohibits the imposition of taxes on articles "during the course of exportation," it does not pro-

hibit "nondiscriminatory pre-exportation assessments" of taxes on articles that are ultimately exported. *United States* v. *IBM*, 517 U.S. 843, 846-848 (1996); see *id.* at 849-850 ("We have not, however, exempted pre-export goods and services from ordinary tax burdens."). The AML fee at issue in this case is the type of ordinary tax on the manufacture of a product that is not prohibited by the Export Clause even as applied to that portion of the product that is exported. See Pet. App. 4a-9a.

a. SMCRA imposes the AML fee on all "coal produced" in the United States. 30 U.S.C. 1232(a). That statutory provision has been implemented through OSM regulations that also use the phrase "coal produced." See 30 C.F.R. 870.12(a). Although neither the statute nor the regulations define that term, the court of appeals accepted the government's position that "coal produced" means "coal extracted." Pet. App. 30a. Petitioners do not appear to dispute either that the phrase "coal produced" can reasonably be construed to mean "coal extracted," or that the imposition of a fee on coal extracted is permissible under the Export Clause. Petitioners argue instead that OSM's regulations should be construed to impose the AML fee on the sale of coal rather than on its production, and that such a scheme is unconstitutional. Petitioners' argument lacks merit.

OSM's administration of the AML fee is fully consistent with SMCRA's constitutional imposition of a tax on coal produced within the United States. The regulations implementing SMCRA provide that a coal "operator shall pay a reclamation fee on each ton of coal produced for sale, transfer, or use." 30 C.F.R. 870.12(a). Although the regulation identifies the most likely subsequent dispositions of the coal (sale, transfer, or use), it does not thereby transform the taxable event from

"produc[tion]," as specified in the statute. The statutory obligation to pay the fee arises when the coal is "produced"; Section 870.12(a) merely specifies the point in time at which the fee must be paid.

OSM's regulations further specify the method of calculating the amount of the AML fee, providing that "[t]he fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." 30 C.F.R. 870.12(b). That provision is a reasonable—and constitutional—construction of the statutory provision at issue because it is tailored to impose the fee on coal material, *i.e.*, on "coal produced." The regulations permit coal operators to physically remove impurities and similar material (*e.g.*, dirt, rocks, and tree stumps) before determining the amount of coal that has been produced and on which a fee is due. 30 C.F.R. 870.12(b)(3), 870.18. Such a scheme permits operators to more accurately measure the actual quantity of "coal produced," thereby benefitting the producers by reducing the overall amount of the fee owed. Pet. App. 8a. Under prevailing industry practice, moreover, the first common point at which weights are determined is generally the time of the first bona fide sale, transfer, or use of the coal. By providing that the AML fee will be calculated based on the weight of the coal at that time, the regulations obviate the need for a separate weighing at the time of extraction. See 42 Fed. Reg. at 44,956. OSM's accommodation of standard measurement practice within the relevant industry does not transform the fee from a tax on production to a tax on sales or exports.

As petitioners point out (Pet. 5), the run-of-mine weight (*i.e.*, the weight of all the mined materials at the time of extraction) may well differ from the weight of the coal at the time the fee is assessed, particularly if

producers remove impurities through a washing process before disposing of the coal. That fact does not indicate, however, that the AML fee is a sales tax. The agency was not faced with a binary choice between imposing a fee on the gross material extracted from the ground and imposing a fee on the sale of coal. As noted, Congress authorized the imposition of a fee on all "coal produced," and OSM reasonably interprets that phrase to mean coal extracted. But the agency acted within its statutory authority, and within constitutional limits, in determining that the weight of coal produced is more accurately and more efficiently determined at the time of sale, transfer, or use by the producer than at the time the gross material is initially extracted from the ground.

There is likewise no merit to petitioners' suggestion (Pet. 17) that a producer's ability to stockpile coal without incurring any obligation to pay AML fees demonstrates that the reclamation fee accrues only "if and when a sale takes place." It is true, though economically unlikely, that a coal operator can evade its obligation to pay the fee by stockpiling coal indefinitely. As the court of appeals observed (Pet. App. 8a), however, that potential loophole indicates a possible enforcement problem for the agency, not a constitutional infirmity in the regulatory scheme. In finding a similar tax upon wine to be a production tax rather than a tax on sale or export, the Ninth Circuit observed that "Congress, in enacting tax laws, * * * did not provide for the highly unlikely, mere possibility that * * * the produced wine * * * will be kept unsold or unmoved from the factory or the winery indefinitely." *Rogan* v. *Conterno*, 132 F.2d 726, 728 (1942); see *R.J. Reynolds Tobacco Co.* v. *Robertson*, 94 F.2d 167, 169 (4th Cir. 1938) (rejecting Export Clause challenge to tax upon manufacture of tobacco for which

payment was deferred until time of sale). The vast majority of coal produced will in fact be sold, transferred, or used. As petitioners acknowledge (Pet. 17), when a producer disposes of its stockpiled coal, OSM enforces the producer's obligation to pay the fees owed on the coal produced by "assessing" the tax.[2]

b. The court of appeals' decision in this case is consistent with this Court's precedents. In *Cornell* v. *Coyne*, 192 U.S. 418, 419 (1904), the Court considered an Export Clause challenge to a tax assessed "upon all filled cheese which shall be manufactured," including cheese manufactured under contract for export. The Court explained that the Export Clause "does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated." *Id.* at 427. It concluded that "[s]ubjecting filled cheese manufactured for the purpose of export to the same tax as all other filled cheese is casting no tax or duty on articles exported, but is only a tax or duty on the manufacturing of articles in order to pre-

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[2] As evidence that OSM imposes the fee upon sales rather than extraction, petitioners point to a 2004 OSM rule that never went into effect. Pet. 17 (citing 69 Fed. Reg. 56,122, 56,127-56,128 (2004)). That rule was published in the Federal Register two weeks before SMCRA's initial AML fee rates were set to expire on September 30, 2004. The rule, which would have established new lower fee rates, noted that fees for stockpiled coal that was mined before October 1, 2004, would be determined using the prevailing fee rates at the time of first sale, transfer, or use. Before the new rates could take effect, however, Congress extended the original fee rates. See Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 135(a), 118 Stat. 3068 (2004). But even if that rule had taken effect, it would merely have perpetuated the existing regulatory regime by determining the amount of the fee imposed on coal produced, as measured at the time of its first sale, transfer, or use. See 69 Fed. Reg. at 56,128.

pare them for export." *Ibid.* By contrast, the Court held in *A.G. Spalding & Bros.* v. *Edwards*, 262 U.S. 66, 67-69 (1923), that a fee on all baseball bats and balls "sold" could not be applied to goods sold to a foreign buyer and delivered to an export carrier because tax liability was triggered by (not merely measured at the time of) the sale of the items rather than by their manufacture.

In *Liggett & Myers Tobacco Co.* v. *United States*, 299 U.S. 383, 384 (1937), this Court considered a tax imposed "[u]pon all tobacco and snuff manufactured * * * and hereafter sold * * * or removed for consumption or sale." The law at issue specified that the tax "accrue[d] on such manufacturers upon removal from the factory or place where" the tobacco or snuff was manufactured. *Ibid.* The Court rejected the contention that, as applied to tobacco products sold to state-owned entities, the tobacco tax was an invalid tax upon the purchasing States. The Court instead concluded that the tax was a tax on the manufacture of tobacco rather than its sale, even though the duty to pay the tax did not accrue until the first sale or removal from the factory of the tobacco. *Id.* at 386-387. As the Court explained, deferral of the duty to pay the tax was "a privilege designed to mitigate the burden; it indicates no purpose to impose the tax upon either sale or removal." *Id.* at 386.

As petitioners observe (Pet. 19), the Court in *Liggett* was not faced with the question whether the tax at issue violated the Export Clause.[3] But the dispositive question in that case—*i.e.*, whether the tax was a tax on sales

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[3] In concluding that the tobacco tax was a manufacturing tax that did not burden the sale of goods, however, the Court in *Liggett* relied on its earlier decision in *Cornell*, which did involve a challenge under the Export Clause. See *Liggett*, 299 U.S. at 386-387.

or a tax on manufacturing—is also the dispositive question here. And just as the tax at issue in *Liggett* was held to be a tax upon the manufacture of tobacco that was assessed at the time of sale or transfer, the AML fee at issue here is a tax upon the manufacture of coal, assessed at the time of sale, transfer, or use.

The respective taxes in the two cases share another feature as well. The Court in *Liggett* noted that the tax was laid as a fixed amount upon each "pound of manufactured tobacco irrespective of intrinsic value or price obtained upon sale." 299 U.S. at 386; see *ibid.* ("The goods may be disposed of at any price without affecting the amount of the tax; that does not vary. Always the manufacturer must pay 18 cents upon each pound—no more, no less."). As relevant to this case, the AML fee also depends on the weight rather than the price of the coal: the fee is a flat 31.5 cents per ton of coal produced by surface mining and 13.5 cents per ton of coal produced by underground mining.[4]

2. Contrary to petitioners' contentions, the Federal Circuit's decision in this case does not conflict with any decision of another court of appeals.

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[4] Prior to October 1, 2007, the statute imposed a 35-cent and 15-cent per-ton fee for surface mining and underground mining, respectively. Both the statute, 30 U.S.C. 1232(a), and the regulation, 30 C.F.R. 870.13, provide a cap if the cents-per-ton assessment would exceed ten percent of the value of the coal at the mine (fair market value minus transportation costs). This cap applies primarily in cases where a coal producer is selling or transferring low-grade waste coal, often where the coal producer is attempting to reclaim the land. None of the fees at issue in this suit were assessed using the ad valorem method, and the petitioners do not contend that the fees they paid were based upon the value of coal rather than its weight.

a. Petitioners contend (Pet. 17-18, 23, 26-27) that the decision below conflicts with the D.C. Circuit's decision in *Drummond Coal Co.* v. *Hodel*, 796 F.2d 503 (1986), because OSM offered a different interpretation of its regulations in *Drummond Coal* and the D.C. Circuit adopted that interpretation. Petitioners assert (Pet. 26-27) that the Federal Circuit's interpretation of the OSM regulations would impose a tax upon the extraction of coal while the D.C. Circuit's interpretation of the same regulations would impose a tax upon the sale of coal. That argument reflects a misunderstanding of the regulatory scheme and the decisions construing it.

Under both the Federal Circuit and the D.C. Circuit interpretations of the OSM regulations, SMCRA imposes a fee on all "coal produced," and the amount of the fee is determined at the time of the first sale, transfer, or use of the coal. Pet. App. 8a, 29a-30a; *Drummond Coal*, 796 F.2d at 504-508. *Drummond Coal* did not involve a challenge under the Export Clause. Rather, the coal producer in that case argued that the regulations then in place, which did not permit producers to take a deduction for moisture that accumulates between the time coal is removed from the earth and the time of sale, were inconsistent with SMCRA because materials other than coal were being included in the fee calculation. 796 F.2d at 504. The D.C. Circuit rejected that challenge, holding that it was reasonable for OSM to calculate the amount of the fee due on the "coal produced" at the time of sale, including any excess moisture that might have accumulated on the coal. That is consistent with the result in this case, which defers to the agency's interpretation of when, as a matter of administering the AML fee, to calculate the fee due on the coal product that is ultimately sold, transferred, or used.

In *Drummond Coal*, the D.C. Circuit suggested that the OSM regulations then in effect rested on the premise that "production" of coal "include[s] the entire process of extracting and selling coal, complete from pit to buyer's door." 796 F.2d at 505; see Pet. 26-27. OSM's prior refusal to allow a deduction for "excess moisture," however, need not be understood in that manner. Rather, the agency could have concluded that weight at the time of sale is the soundest and most administrable proxy for weight at the time of extraction, and that any effort to estimate the amount of moisture that has been added between extraction and the time the coal is first weighed would be unduly burdensome. Indeed, the D.C. Circuit in *Drummond Coal* noted those practical difficulties in upholding OSM's then-existing regulatory approach. See 796 F.2d at 507.

In any event, even if there were a conflict between the two decisions, petitioners acknowledge (Pet. 16) that OSM revised its regulations soon after the ruling in *Drummond Coal* to permit producers to take a deduction for any excess moisture that might be absorbed after removal of coal from the mine. 30 C.F.R. 870.18; 53 Fed. Reg. 19,718 (1988). Petitioners, who filed suit in 2001, are well outside the limitations period for challenging any AML fees that were calculated before that regulatory change was adopted in 1988. Insofar as OSM's choice between alternative collection methodologies bears on the constitutional question presented here, petitioners' suit should be decided based on the regulatory scheme in effect at the time of the assessments that are the subject of their current legal challenge.

b. Petitioners are also incorrect in arguing (Pet. 13, 22-24; see also brief of amici law professors) that the court of appeals' decision widens an existing circuit split

"over whether the canon of constitutional avoidance takes precedence over the deference owed to an agency's settled interpretation of a statute that it implements under a direct delegation from Congress." Petitioners' argument is based on an incorrect premise—namely, that "the Secretary has, through his regulations, authoritatively interpreted SMCRA as imposing a tax on sales." Pet. 23. As discussed above, and as the court of appeals recognized, see Pet. App. 8a, that is a mistaken interpretation of OSM's regulations.[5] Although the regulations require the AML fee to be computed and assessed at the time of the first sale, transfer, or use, the tax is imposed on the production of coal rather than upon its sale.

3. Review by this Court is not warranted for three other related reasons.

a. It cannot reasonably be disputed that SMCRA validly imposes a fee on coal extracted from the earth. Petitioners therefore would be legally obligated to pay AML fees even if OSM were required to calculate the amount of the fee due immediately upon extraction, based on the weight of the gross material that is removed from the ground, rather than at a later date after producers have an opportunity to remove impurities from the coal. 30 U.S.C. 1232(a). And, as between those potential assessment methodologies, OSM's regulatory approach produces lower fees than would a requirement that fees be calculated at the time of extraction. Thus,

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[5] In characterizing the AML fee as a tax on sales, petitioners repeatedly suggest (*e.g.*, Pet. 12) that, under OSM's regulations, the sale of coal is the *only* event that can trigger the assessment and collection of the fee. OSM's regulations in fact provide that "[t]he fee shall be determined by the weight and value at the time of initial bona fide sale, transfer of ownership, or use by the operator." 30 C.F.R. 870.12(b).

even if petitioners' view of the Export Clause were accepted, petitioners could not likely establish an entitlement to refunds for payments made in the past, since they could not demonstrate that they have paid fees higher than those they would have owed under a constitutionally valid assessment methodology.

b. Before the Court could decide the question presented, it would first need to resolve the jurisdictional issue raised by the United States in earlier proceedings in this case. See *Consolidation Coal II*, *supra*, 351 F.3d at 1380-1381. Because petitioners do not dispute that SMCRA could be constitutionally applied to coal produced for export, their argument is essentially that OSM's fee-deferral regulations exceed the bounds of the statute or are otherwise *ultra vires*. Challenges to OSM's regulations must be brought in the District Court for the District of Columbia within 60 days after promulgation of the relevant rule, however, see 30 U.S.C. 1276(a)(1), and the Federal Circuit has held that requirement to be jurisdictional, see, *e.g.*, *Amerikohl Mining, Inc.* v. *United States*, 899 F.2d 1210, 1215 (1990). Indeed, the plaintiff in *Drummond Coal* filed suit in the D.C. district court to challenge the assessment methodology set forth in OSM's regulations (and, in particular, OSM's refusal at that time to allow a deduction for excess moisture), but it did not contend that deferred collection of the AML fee created an Export Clause violation.

The court of appeals rejected the United States' jurisdictional argument in this case, holding that the Export Clause creates a cause of action against the government that can be brought under the Tucker Act. See *Consolidation Coal II*, 351 F.3d at 1380-1381. As this Court subsequently recognized in *United States* v.

Clintwood Elkhorn Mining Co., 553 U.S. 1, 9 (2008), however, the correctness of that conclusion remains an open question. The Court's decision in *Clintwood Elkhorn* also makes clear that, even if the Export Clause does create a cause of action, suits to enforce that right remain subject to the timing requirements imposed by Congress. See *id.* at 9-12.

c. Petitioners contend that "the decision below provides a ready roadmap for the Government to evade the clear and strict terms of the Constitution." Pet. 13; see Pet. 28. The features of the regulatory scheme that petitioners view as constitutionally objectionable, however, were intended (and in fact function) as accommodations to the coal industry, see pp. 3-4, *supra*, and their natural effect is to reduce the AML fees petitioners owe on *all* the coal they produce, whether intended for export or otherwise. And even after the D.C. Circuit held in *Drummond Coal* that OSM was not required to allow a deduction for excess moisture, the agency amended its regulations to authorize such a deduction, thereby eliminating the main practical disadvantage to the industry that the deferred-collection method had previously entailed. See p. 14, *supra*.

Because SMCRA's directive that fees be assessed on "coal produced" is clearly susceptible of constitutional application to coal intended for export, there is no ground for suggesting that the government has concealed the true character of the tax in order to rebut an Export Clause objection. Rather, having reaped the benefits of OSM's regulatory accommodations over a prolonged period of time, petitioners now invoke those accommodations as grounds for refunds of assessments previously paid. This case cannot plausibly be viewed as one involving manipulative government conduct.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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